IN THE

Supreme Court of the United States.

UNION TRUST COMPANY AND SECURITY WAREHOUSING COMPANY,
Appellants,

vs.

HENRY L. WILSON, TRUSTEE IN BANKRUPTCY OF HARRY L. FLANDERS,
Appellee.

No. .....

To Messrs. Edwin Burritt Smith, George Packard, W. Tudor ApMadoc, and Vincent J. Walsh, Counsel for above named Appellee:

Messrs. Newton Wyeth and Joseph E. Paden, Counsel for Respondents in First National Bank of Chicago, et al. v. Chicago Title & Trust Company, Trustee in Bankruptcy of Alexander Rodgers, et al., No. 139, in the above entitled court:

PLEASE TAKE NOTICE that on Monday, the 14th day of November, A. D. 1904, at twelve o'clock noon, or as soon thereafter as counsel can be heard, at the court

room in Washington, the appellants will move the court as per printed motion and suggestions in support thereof herewith served upon you.

Respectfully,

Charles P. Holden.

Henry S. Robbins

Counsel for Appellants.

Received copy of above notice and copy of motion and suggestions this ..... day of November, A. D. 1904.

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Counsel for Respondents in First National Bank of Chicago et al. v. Chicago Title and Trust Company, Trustee, et al, No. 139.

IN THE

SUPREME COURT OF THE UNITED STATES.

File No.

Term No.

Union Trust Company and Security Warehousing Company, *Appellants*, *vs.* Henry L. Wilson, Trustee in Bankruptcy of Harry L. Flanders, *Appellee*.	On certificate from the Circuit Court of Appeals for the Seventh Circuit

Motion of Appellants to Set This Case for Hearing With Case No. 139 Upon This Docket.

Now come the appellants, Union Trust Company and Security Warehousing Company, by Charles R. Holden and Henry S. Robbins, their counsel, and move this Honorable Court to set this cause for hearing at the same time as, or immediately following the case of *First National Bank of Chicago et al. v. Chicago Title and Trust Company, Trustee in Bankruptcy of Alexander Rodgers, et al.*, File No. 19130, Term No. 139, upon the docket of this court, and for grounds of this motion show the following, to wit:

This cause comes to this court upon certificate of the Circuit Court of Appeals of the Seventh Circuit, which desires the instruction of this court upon the questions:

(1) Whether certain receipts issued by appellant, the Security Warehousing Company, to one Flanders, for whom appellee is trustee in bankruptcy, and by Flanders pledged to appellant Union Trust Company as security for loans, are, under the facts recited in the certificate, valid warehouse receipts, so that such endorsement of them to the Union Trust Company constituted a pledge of the property therein described.

(2) Whether, if such receipts are not to be deemed valid as warehouse receipts, the facts recited constitute a pledge by Flanders to the Union Trust Company of the property in controversy.

(3) Whether, if no pledge arose, the transactions gave rise to an equitable lien in favor of the Union Trust Company, which is superior to the title of the trustee in bankruptcy.

The certificate recites among other things that "the Security Warehousing Company is a corporation organized under the laws of New York, with power to transact, and it has for more than two years last past been engaged in transacting, the business of a warehousing company on a large scale throughout the United States. As a rule, except in a few cases, it owns no warehouse of its own and maintains no warehouse building wherein it stores the property of sundry persons, but its general method of warehousing is the leasing from persons desiring to obtain its receipts, of all or a portion of a building or the leasing of vacant land from such persons, and the placing thereon of property and issuing storage receipts therefor" in the manner in said certificate set out, and it is because of the contention of counsel for the appellee

that this method of warehousing is fraudulent as to creditors, and insufficient in law as against a trustee in bankruptcy, that the foregoing questions are raised.

The case of *First National Bank of Chicago* v. *Chicago Title & Trust Company, Trustee, et al.* is in this court by *certiorari*. In that case the National Storage Company, which is doing business in the same way, as does the Security Warehousing Company had issued certain receipts to one Rodgers, and his trustee in bankruptcy attacked the legality of this system of warehousing and the validity of such receipts as against the trustee in bankruptcy upon the same ground as the receipts of the Warehousing Company are attacked in this case. While the acts relied upon by the Storage Company in that case as sufficient to constitute legal control and possession by it of the stored property, differ somewhat from those shown in the case in which this motion is made, the legal questions above stated are practically the same as in case No. 139, and the decision in 139 may dispose of this case.

Counsel for appellee in the above entitled cause recognizes the propriety of this motion by endorsing upon the notice herewith submitted his consent to the granting of this motion.

Notice has also been served upon the respondents' counsel in case No. 139.

Respectfully submitted.

Charles R. Holden

Henry S. Robbins

Counsel for Appellants.

FILE COPY.

Supreme Court U. S.
FILED
JAN 19 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 424.

UNION TRUST COMPANY and SECURITY WAREHOUSING COMPANY,

vs.

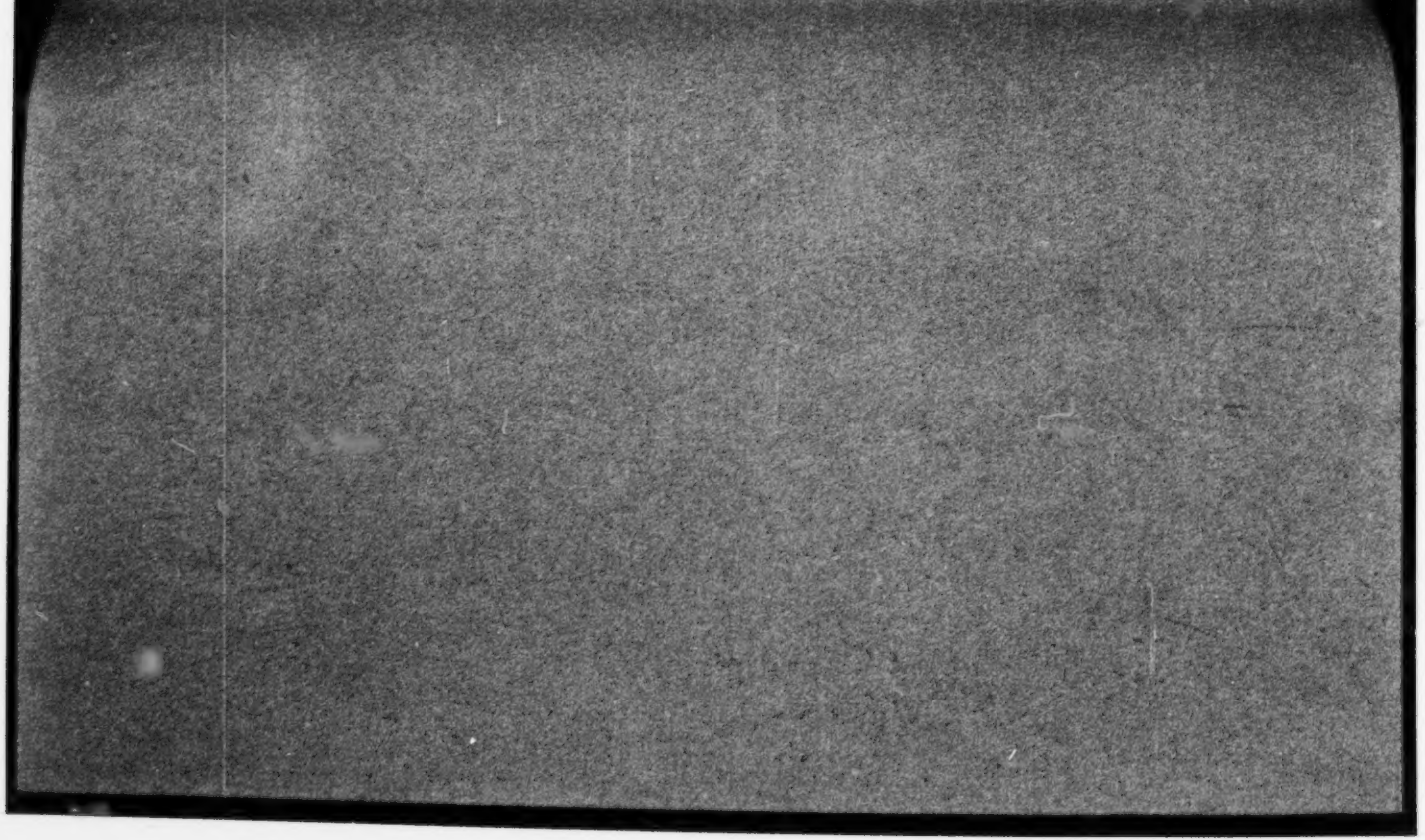
HENRY L. WILSON, Trustee in Bankruptcy of HARRY L. FLANDERS.

On Certificate from the Circuit Court of Appeals for the Ninth Circuit.

BRIEF AND ARGUMENT FOR HENRY L. WILSON, TRUSTEE IN BANKRUPTCY OF HARRY L. FLANDERS.

EDWIN BURRITT SMITH,
GEORGE PACKARD,
VINCENT J. WALSH,
Counsel for Henry L. Wilson, Trustee.

THE GOODRICH-HARRIS PRINTING CO., 118 RANDOLPH STREET, CHICAGO, ILL.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 424.

UNION TRUST COMPANY and SECURITY WAREHOUSING COMPANY, *vs.* HENRY L. WILSON, Trustee in Bankruptcy of HARRY L. FLANDERS.	On Certificate from the Circuit Court of Appeals for the Seventh Circuit.

STATEMENT.

The question to be determined in this case is whether the Trustee in Bankruptcy of H. L. Flanders or the Union Trust Company is entitled to certain leather found in basement of the place of business of the bankrupt at the time of his bankruptcy.

The position of the trustee is that Flanders at one time was admittedly the owner of this leather and that since that time nothing has taken place which, at all events against a trustee in bankruptcy, has transferred that ownership.

The position of the Union Trust Company is that Flanders, by enclosing a certain portion of his basement, by leasing the space so enclosed to a so-called "warehousing" company, by depositing the leather in question in the leased space and receiving from the "warehousing" company receipts therefor, and by endorsing and delivering these receipts to the Trust Company as security for money lent, transferred the title to the leather to the company and gave it a lien upon the property for the amount of the loans.

The details of the so-called "warehousing" are set forth in the certificate of the Circuit Court of Appeals, which is also contained in the brief of opposing counsel.

One point, however, we desire to make clear. It is evident from the argument of appellants and from the line of authorities they cite, that they profess to consider that the question before this court involves the legality of this "warehousing" system under whatever conditions established and wheresoever applied.

Our business, of course, is to convince the court that *under the circumstances of this particular case* the legal result contemplated by the parties was not effected.

Whether under other circumstances, where property is of a different nature and differently situated, and where the warehousing is sufficiently notorious, a system similar to the one in this case could ever be valid is not the question here, and we have no desire to discuss it.

There is no necessity and we have no wish to place the entire system upon trial in this case.

The phase only which is presented by the certificate here is all we ask this court to condemn. The condemnation of that phase may well leave open to future consideration other phases to which our opponents advert.

It seemed proper to make this clear in this place in order to put plainly before the court the limits of the legal questions which we intend to discuss.

BRIEF.

I.

THE RECEIPTS ISSUED BY THE SECURITY COMPANY WERE NOT TRUE WAREHOUSE RECEIPTS. THEIR ENDORSEMENT AND DELIVERY TO THE TRUST COMPANY, THEREFORE, AS SECURITY FOR LOANS, WAS NOT A PLEDGE OF THE LEATHER COVERED BY THEM WHICH WOULD BE VALID AS AGAINST ATTACHING CREDITORS.

Burton v. *Cunyea*, 40 Ill., 320.
Thornton v. *Davenport*, 2 Ill., 295.
Hamilton v. *Russell*, 1 Cranch., 309.
Warner v. *Norton*, 20 Howard, 448.
Ticknor v. *McClelland*, 84 Ill., 471.
Hervey v. *R. I. Locomotive Works*, 93 U. S., 664.
Dooley v. *Pease*, 180 U. S., 126.
Harkness v. *Russell*, 118 U. S., 663.
Gibson v. *Stevens*, 8 Howard, 384.
Conrad v. *Atlantic Ins. Co.*, 1 Peters, 445.
Geilfuss v. *Corrigan*, 95 Wis., 651.
Franklin National Bank v. *Whitehead*, 149 Ind., 560.
State v. *Watson*, 141 Mo., 338.
Shepardson v. *Cary*, 29 Wis., 34.
State v. *Bryant*, 63 Md., 66.
Staubli v. *Blaine National Bank*, 11 Wash., 426.
Thorne v. *First National Bank*, 37 Ohio St., 254.

Bell & Coggeshall Co. v. *Glass Works Co.*, 48 S. W., 440.
Yenni v. *McNamee*, 48 N. Y., 614.
Adams v. *Merchants National Bank*, 2 Fed., 174.
Broadwell v. *Howard*, 77 Ill., 305.
National Bank v. *Wilder*, 34 Minn., 149.
Merchants Bank v. *Hibbard*, 48 Mich., 118.
Union Trust Co. v. *Trumbull*, 137 Ill., 146.
In re Rodgers, 125 Fed., 169.
Tradesmen's National Bank v. *Jagode*, 186 Pa. St., 556.
Moores v. *Jagode*, 195 Pa. St., 163.
Mechanics Trust Co. v. *Dandridge*, 37 S. W., 288.
Bucher v. *Commonwealth*, 103 Pa. St., 528.

II.

IF THE RECEIPTS WERE NOT TRUE WAREHOUSE RECEIPTS, THE TRANSACTIONS DID NOT CONSTITUTE A PLEDGE OF THE LEATHER BY FLANDERS TO THE TRUST COMPANY WHICH WOULD BE VALID AGAINST ATTACHING CREDITORS.

Casey v. *Cavaroc*, 96 U. S., 467.
Sinsheimer v. *Whitely*, 111 Cal., 378.
Second Nat. Bank v. *Gilbert*, 174 Ill., 485.
Harding v. *Eldridge*, 71 N. E., 115.
Sholes v. *Asphalt Co.*, 183 Pa. St., 528.
Union Trust Co. v. *Trumbull*, 137 Ill., 146.
George v. *Pierce*, 123 Cal., 172.
Watson v. *Dealy*, 59 N. Y. Supp., 623.
Harington v. *Blanchard*, 70 N. H., 597.

Story v. *Cordell,* 13 Mont., 204.
Thorne v. *First National Bank,* 37 O. St., 250.
Button v. *Rathbone,* 126 N. Y., 187.
Caperton v. *McCormick,* 22 S. Rep.; s. c., 74 Miss., 857.
Martin v. *Sexton,* 72 Ill. App., 395.
Moores v. *Redding,* 167 Mass., 322.
Drury v. *Moores,* 50 N. E., 618.

III.

THE TRUST COMPANY HAD NO EQUITABLE LIEN UPON THE LEATHER ENFORCEABLE AGAINST A TRUSTEE IN BANKRUPTCY.

Bell & Coggeshall Co. v. *Glass Works Co.,* 48 S. W., 440.
Thorne v. *First National Bank,* 37 O. St., 254.
Yenni v. *McNamee,* 48 N. Y., 614.
Adams v. *Bank,* 2 Fed., 174.
Chicago Dry Dock Company v. *Foster,* 48 Ill., 507.
Casey v. *Cavaroc,* 96 U. S., 467.
Matthews v. *Hardt,* 79 App. Div. (N. Y.), 570.
Hurd's Ill. Rev. Stat., Cap. 95, page 1270.
United States Bankruptcy Act, Sections 67-70.
Hooven v. *Burdette,* 153 Ill., 672.
Gilbert v. *Nat. Cash Register Co.,* 174 Ill., 288.
Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593.

In re Pekin Plow Co., 112 Fed., 308.
In re Thorp, 130 Fed., 371.
Tatman v. *Humphrey*, 184 Mass., 361.
In re Carpenter, 125 Fed., 831.
In re Butterwick, 131 Fed., 371.
Canadian Bank of Commerce v. *McCrea*, 106 Ill., 381.

ARGUMENT.

I.

THE RECEIPTS ISSUED BY THE SECURITY COMPANY WERE NOT TRUE WAREHOUSE RECEIPTS. THEIR ENDORSEMENT AND DELIVERY TO THE TRUST COMPANY, THEREFORE, AS SECURITY FOR LOANS, WAS NOT A PLEDGE OF THE LEATHER COVERED BY THEM WHICH WOULD BE VALID AS AGAINST ATTACHING CREDITORS.

The first question certified by the Circuit Court of Appeals requires a determination by this court whether the documents issued by the Security Company in this case and endorsed by the bankrupt and delivered by him to the Union Trust Company were warehouse receipts *in fact*, so that such endorsement and delivery transferred to the Trust Company title, good against all the world, to the property in question.

It is urged by opposing counsel that the origin of the so-called "warehousing" appearing in this case is found in the requirements of modern commerce.

The plea is therefore made that, owing to the well-known adaptability of the common law to the various phases of commercial evolution, this court should sanction the system here exemplified.

The argument that new commercial needs, actual or feigned, must compel judicial approval of new commercial methods, however, is not always conclusive.

As was aptly said by the Supreme Court of Illinois in the case of *Burton* v. *Curtis*, 40 Ill., 320, where it

was sought to obtain a ruling that warehouse receipts were negotiable in the sense that bills and notes are negotiable:

> "It is true it is one of the excellencies of the common law, that its principles can be adapted by the courts to new emergencies as they arise in the rapid development of modern society, but this flexibility of the system in judicial hands should be confined to the new application of settled principles, or of principles in harmony with those that are settled, *and should not be extended to the making of new rules that are really in violation of maxims lying at the foundation of our law, and as old as the law itself.*"

Before admitting the force of the contention made, it might be well to seek the real reason of the undoubted rule that the transfer of warehouse receipts, bills of lading and similar documents operates as a transfer of the property which they represent.

It has, of course, for centuries been the rule that the sale or pledge of personal property without the actual transfer of possession, that is to say, without delivery by the vendor or pledgor to the vendee or pledgee, is fraudulent as against creditors. In Illinois, since the case of *Thornton* v. *Davenport*, 2 Ill., 295, it has been uniformly held that such a sale or pledge is, as to creditors, fraudulent *per se*. This court has held the same doctrine in the case of *Hamilton* v. *Russell*, 1 Cranch, 309. The later case of *Warner* v. *Norton*, 20 Howard, 448, it is true, seems to tend rather to the view that such a transfer is *prima facie* fraudulent merely. In any event, it has been the uniform doctrine of this court, as we believe of every other, that such a transfer is at least presumptively a fraud upon creditors.

The rule in Illinois and the reason for it are well expressed in the case of *Ticknor* v. *McClelland,* 84 Ill., 471, where it was said at page 474:

> "The policy of the law in this state will not permit the owner of personal property to sell it, and still continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit upon mankind. It is the well established doctrine of this court that an absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent *per se* and void as to creditors and purchasers."

And that this is the well established doctrine in Illinois and that the United States courts will consider it a rule of that state, is conceded by the court in *Hervey* v. *R. I. Locomotive Works,* 93 U. S., 664, and in the recent case of *Dooley* v. *Pease,* 180 U. S., 126.

This therefore is a rule most stringently laid down and jealously guarded by the courts of Illinois, and in the case of *Harkness* v. *Russell,* 118 U. S., 663, it is recognized that, beyond most states, this state is particularly strict in adhering to this principle and in the application of it.

Exceptions to this rule, while exceptions doubtless must be found, must logically therefore be exceptions arising from real necessities and must be exceptions limited to the necessities which require them.

Early in the history of the law, almost as early in fact as the establishment of the rule we are now considering, it became recognized that such real commer-

cial necessities required that certain exceptions *should* be recognized. The needs of commerce demanded that merchandise should be shipped from place to place. Like needs demanded that merchandise should be placed in storage, frequently at some place far from the residence of the owner. It was apparent, too, that the owner of goods in transit or in storage might have need or a profitable opportunity to sell or pledge them while actual delivery was yet impossible. From these real commercial needs arose the principle that goods so situated might be sold or pledged by the transfer not of the property itself, but of recognized evidences of title to them.

In the case of *Gibson* v. *Stevens,* 8 Howard, 384, the necessity of such an exception and the reason for it was recognized when the court said, speaking of the transfer of property by means of the endorsement of warehouse receipts:

> "This mode of transfer and delivery has been sanctioned in analogous cases by the Courts of Justice in England and in this country, *and is absolutely necessary for the purposes of commerce.* A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the endorsement and delivery of a bill of lading. * * *
>
> The rule is not confined to the usages of any particular commerce, but applies to every case *where the thing sold is from its character or situation at the time incapable of actual delivery.*
>
> The contract between the plaintiff and McQueen and McKay having been made in New York, the articles in the warehouse in Fort Wayne *were incapable of actual delivery, consequently* the delivery of the evidences of title, with the order to

the bailee endorsed on them, passed the title and possession to the plaintiff."

And in the earlier case of *Conard* v. *Atlantic Insurance Company*, 1 Peters, 445, where the pledge of goods at sea by endorsement of bills of lading was in question, the court said:

> "Without undertaking to suggest whether in any case the want of possession of the thing sold constitutes *per se* a badge of fraud, or is only *prima facie*, a presumption of fraud, a question upon which much diversity of judgment has been expressed, it is sufficient to say that in case, even of an absolute sale of personal property, the want of such possession is not presumptive fraud *if the possession cannot from the circumstances of the property, be within the power of the parties.*"

The rule that property in storage or in transit may be transferred by the endorsement and delivery of the bill of lading and warehouse receipt, therefore is an *exception* to the broader rule that sales and pledges of personal property without delivery are fraudulent.

The application of this exception must, it is submitted, be limited to the needs which required its establishment. In other words, while it is very apparent that commerce requires that where goods are actually in storage a transfer of the warehouse receipt should transfer the goods, no necessity is perceived for applying this rule where there is no storage in fact.

We have in brief the situation that a very necessary general rule must needs be modified by reason of very apparent, real commercial requirements for carriage and storage. To argue from this that the benefit of this exception may be obtained by the creation of fictitious storage or carriage, is to ignore the essential rea-

son for the making of the exception. Actual storage and carriage brought warehouse receipts and bills of lading into being. Actual storage or carriage should be always the only excuse for their issuance.

Moreover, in allowing the transfer of warehouse receipts on property *actually in storage in a warehouse* and bills of lading for property in transit to operate as a transfer of the property itself, the law has run little risk of the dangers against which the general rule was meant to guard.

No merchant can obtain credit by the appearance of ownership which possession gives after that possession has been transferred to an actual warehouse or a carrier. This is pointed out in *Geilfuss* v. *Corrigan*, 95 Wis., 651, where the court said at p. 669:

> "The reasons for this rule are very apparent. In such cases the property itself is in the hands of a third person or corporation instead of in the possession of the vendor or pledgor, consequently it does not furnish any false bases of credit, nor is any creditor deceived, because it is well understood that goods in the hands of warehousemen or carriers are or may be the property of others, and, by the long usage of trade, subject to just this mode of transfer. *No such considerations, however, apply in the case of goods in the possession of the vendor or pledgor or of some third person who is not a warehouseman or wharfager and we know of no rule which makes the mere delivery of a receipt a constructive delivery of the property in pledge in such case.*"

To recapitulate:

The general rule is that personal property cannot as against third persons be validly sold or pledged without actual delivery.

This rule is imperatively demanded for the protection of honest trading; it has always been jealously guarded by the courts and perhaps extended beyond its original scope by the courts of Illinois.

The principle that property in the possession of a warehouseman or carrier may be transferred by the endorsement and delivery of the written evidence of title to it is an exception to this general rule, permitted only because of the need for merchants to ship and store goods and to pledge or sell them while so shipped or stored.

This exception, owing to the publicity and known character of the business of warehousemen and of carriers, is attended with the least possible danger of the evils guarded against by the general rule.

With these principles in mind, we invite the court's attention to their application to the circumstances of this case.

The certificate shows that the Security Warehousing Company is a corporation ostensibly engaged in the warehousing business. It has no warehouse of its own—at all events none appearing in this case. Its avowed purpose is to establish upon merchants' own premises, apparently where the merchant wills—in the basement in this case—in the cellar or on the roof doubtless, if the merchant so desires in others—certain premises of its own. Upon these premises being established they straightway become a "warehouse." The "establishment" consists of the merchant selecting some convenient—and if the course followed in this case is followed always—some obscure spot upon his

premises. The spot selected is enclosed by the merchant and thereupon is leased to the company. The lease is for a nominal amount. Concurrently with the execution of this lease a contract is executed by the merchant and the company by which the company agrees to receive the property *of the merchant* within the enclosure for "storage."

The rate of payment is regulated not by the size or weight of the articles stored, but by their value; and this rate, unlike the rental, is not a nominal one, but a substantial percentage per annum of the value of the property "stored." In spite of this high rate of payment the merchant apparently obtains no benefit for the storage. On the contrary, he expressly obligates himself by his agreement *to assume all responsibility for the property, to indemnify the company for all loss, no matter who holds the receipts given for it, and to pay it for all expenses incurred in connection with it.*

The company, therefore, while ostensibly a bailee, expressly guards against any of the obligations imposed upon bailees by law. The remarkable spectacle is therefore presented of a merchant giving up, without compensation, a substantial portion of his premises for which he pays a substantial rent and paying for the use of this very same portion for storage a large proportion of the annual interest value of the property he places there.

It cannot be said, however, that for this sacrifice the company does not give prompt and complaisant attention to the merchant's demands. Whenever property is to be placed in or with-

drawn from the enclosure an agent of the company is always ready to come from its place of business, a half a mile away, and unlock the door. The merchant's employes thereupon place in the enclosure or remove from it such property as they may wish and the company thereupon takes from the merchant or issues to him, as the case may be, warehouse receipts for the goods.

The similitude of warehousing is kept up with all the completeness *consistent with the results desired.* Signs (in the basement) are placed upon the enclosure and these are readable by any casual stranger who might descend the elevator shaft. Receipts are always issued by the company when property is placed in the enclosure and property is never taken out without surrender of the corresponding receipts. No office of the company, however, is on the premises, nor are signs placed anywhere except in the basement, nor does any representative of the company vex the trader or excite the enquiry of his customers by his presence.

It must be apparent that such a system does not involve true warehousing in the sense that there is any *actual storage* of property.

The common reasons for such storage result either from the fact that the owner has not sufficient room for the goods upon his own premises or that he desires a greater measure of safety than he can supply them or that the goods are at a distance from his own place of business, so that they must be placed within the keeping of some third person or corporation. The business of a ware-

houseman is to supply the needs created by one or all of these situations. His business, in a word, is that of *storage*. As is said in *Franklin National Bank* v. *Whitehead*, 149 Ind., 560, at p. 569:

> "A warehouseman is defined to be the owner of a warehouse, one who, as a business and for hire, *keeps and stores* the goods of others."

The Century Dictionary defines "Warehouse" as

> "A house in which wares or goods are kept; a store house.
>
> Specifically: (a) A store in which goods are placed for safe keeping; a building for the temporary deposit of goods for a compensation. (b) A building for storing imported goods on which custom duties have not been paid. (c) A store for the sale of goods at wholesale; also, often, a large retail establishment."

The same authority defines "warehousing" as

> "1. The act of placing goods in a warehouse.
> 2. The business of receiving goods for storage."

And defines "Warehouseman" as—

> "1. One who keeps a warehouse.
> 2. One who is employed in or has charge of a warehouse."

The Supreme Court of Missouri, in the case of *State* v. *Watson*, 141 Mo., 338, said at p. 341:

> "There is no technical meaning to the word warehouse different from its ordinary signification of storehouse. It is qualified or modified according to the purposes to which it is devoted and the character of the goods, wares and merchandise deposited therein."

It is submitted, therefore, that the Security Company does not bring itself within any recognized definition of warehouseman nor can the enclosure in this case, by

any stretch of language, properly be termed a warehouse.

The Security Company did not keep and store the goods of others.

Its sole duty was limited to allowing *Flanders* to place on a certain portion *of his own premises* certain property belonging to him. Flanders received no additional protection, but, on the contrary, was just as liable for a loss or injury to the goods as if they were kept anywhere else upon his premises. He paid nothing for storage *as storage.* He received no storage. The only payments were based upon the value of the goods and obviously were, in effect, a premium upon the loans that Flanders might make by means of the warehouse receipts. Of course, words may be used in any sense the speaker chooses, but to call this true warehousing in the sense of providing storage and to say that the warehousing company received and kept the goods in store for Flanders for hire is simply to pervert the meaning of words and use them in senses unknown to the law or to the language.

The question might well be asked: Why this elaborate creation of forms and symbols, furnishing almost every element characteristic of a *real* warehouse, except the essential characteristic which makes it a warehouse—the storage of property?

The only answer apparent is this:

The receipts issued by the warehousing company are in form ordinary warehouse receipts, *by their terms transferable by endorsement and delivery.*

The sole object of the elaborate fiction here resorted to therefore is to enable the merchant to raise money upon his stock in trade by the pledging of these "warehouse" receipts, that is to say, he seeks to place a lien upon his property while still retaining it upon his premises and—if forms be disregarded and realities considered—within his control.

This identical result could, of course, be obtained by the execution and recording of a chattel mortgage. Hurd's Ill. Rev. Stat., 1903, Cap. 95, § 1, p. 1270 (quoted at length later).

Why does the merchant not only prefer one method to the other, but pay a substantial percentage of the value of his property per annum for the privilege of using one method when the mere cost of recording a mortgage would permit him to use the other?

The answer must be found in a desire and purpose to conceal from the public the fact that money has been borrowed and that to secure the loan a lien has been placed upon his stock in trade.

In the face of these facts, undeniable and significant, how can it ever be contended that under this system there is ever a *bona fide* attempt to notify the world at large of the fact of the placing of the lien upon the property. Signs (in the basement) and enclosures (in the basement) there may be, but it is an affront to common sense derived from common experience to say that under these circumstances this warehousing system could ever permit one tithe of the publicity that the simple recording of a chattel mortgage would afford.

Is it not apparent that if it did so, within twenty-four hours its occupation would be gone?

Plainly, therefore, the real object of this entire system, disguise it by forms and symbols as one may, is to enable the trader, by concealment, to evade the provisions of the Chattel Mortgage Act.

In this situation, therefore, whatever new exigency of commerce called this species of warehousing into being, was not an exigency requiring the extension of *storage* facilities. Nor is it such a modern exigency as opposing counsel would have us suppose.

This is not a new phase of the evolution of any principle of true *warehousing*.

It is actually a new phase of a device long employed by a certain class of merchants to place secret liens upon their stock in trade and still retain it in their possession. In this aspect it will be found that while there are some new forms to the system here presented there is nothing new in the object sought to be attained. Essentially there is very little new in the methods employed.

The perusal of the reported cases will show it has long been a familiar device for merchants in failing circumstances or seeking better credit than they deserved to pretend to operate *themselves* as warehousemen and to issue and hypothecate warehouse receipts for their own property while retaining it upon their premises.

An early and typical case is

Shepardson v. *Cary*, 29 Wis., 34.

This was a case where a so-called warehouse receipt, issued by a coal company for coal in its possession, and endorsed and pledged for a loan, was held void. The court recognized the doctrine that a *warehouseman* may issue a warehouse receipt for his own property in his own warehouse and pledge the receipt for his own debt and that the pledge will be protected against the warehouseman's attaching creditors. It, however, held the receipt in this case void and, speaking of the coal company, said, at p. 42:

> "The fact that they were warehousemen, assuming them to have been such, was not there shown. *Proof of their character as such was necessary in order to give effect to the instrument as a warehouse receipt.*
>
> The court could not take judicial notice that they were warehousemen nor presume it as a fact from the mere issuing of the receipt. Actual proof was necessary in order to make an effectual transfer of the property in that way for otherwise it would be competent for every person, whether a warehouseman or not, thus to dispose of personal property in his possession, to the great embarrassment and deception of subsequent purchasers, creditors and others. To uphold the receipt as a proper warehouse document, transferring the title to the property and operating as a good, constructive delivery of it to the vendee, *it must in all cases distinctly appear that it was executed by a warehouseman, one openly engaged in that business* and, in the usual course of trade, without fraud or intention of fraud or bad faith on the part of the person receiving and seeking to enforce title under it."

In *Franklin National Bank* v. *Whitehead,* 149 Ind., 560, a similar device was attempted by a nail company which issued so-called warehouse receipts, covering

certain nails upon its premises. One lot, covered by one warehouse receipt was, after the issuing of the receipt, placed in a separate pile. The nail company, before the issuing of the warehouse receipts, had, in compliance with the Indiana statute, although not authorized by its charter to conduct a warehousing business, made written application to the auditor of its county for a permit to keep a public warehouse and received a document purporting to authorize it to operate a public warehouse. The court, however, held that the warehouse receipts were void and that their transfer, therefore, did not create a lien to the property covered by them.

In *Geilfuss* v. *Corrigan,* 95 Wis., 651, a furnace company issued to a mining company so-called storage warrants, in form ordinary warehouse receipts, covering pig iron on its premises, and these warrants were endorsed and pledged for loans. The pledgee, a bank, took the warrants in good faith, without any notice of infirmity of title. In a contest between judgment creditors and the holder of the receipts, the court held that the receipts were void as warehouse receipts and that there was no valid pledge. The court said, as to the first point, at p. 663:

> "The so-called storage warrants were not warehouse receipts, either under the laws of Pennsylvania or Wisconsin. In order to be such they must be issued by a warehouseman or one openly engaged in the business of *storing property* for others for a compensation. 1 Brightly's Purdous Dig., 12th Edition, page 165, Sec. 1; *Bucher* v. *Commonwealth,* 103 Pa. St., 528; *Shepardson* v. *Cary,* 29 Wis., 34. And the fact that the receipt was executed by a warehouseman must affirmative-

> ly appear in the evidence. *Shepardson* v. *Cary*, 29 Wis., 34. Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, proof was conclusive that it was not in such business and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank."

State v. *Bryant*, 63 Maryland, 66, was a case where Bryant was indicted for delivering to certain persons certain property for which he had already issued a receipt to another person. The Maryland Statute provided that "all warehouse * * * or storage receipts for goods and chattels of any kind stored or deposited or acknowledged to be stored or deposited for any purpose in any warehouse, elevator *or other place of storage or deposit* in this state" should be negotiable instruments. Another section (for violating which defendant was indicted) provided that no person issuing such instruments should deliver the property described to any one but the legal holder of the receipt.

The receipt in this case (omitting date and signature) was:

> "Received on storage, in my canning house from E. B. M. 1720 cases 3 X tomatoes, my own packing—Deliverable to order of E. B. M. only on production of this receipt properly endorsed."

It was held that the judgment sustaining a demurrer to the indictment should be affirmed.

The court said, at p. 68, *et seq.* (the italics are the court's):

> "The language of the act is *'bills of lading,'*

'warehouse,' 'elevator' and 'storage' receipts. These instruments are well known to commercial men, and the rights of parties well defined by law before the passage of this act. Goods and chattels in the hands of the carrier were incapable of being actually delivered during the transit, and after they arrived at the place of delivery, it might be to the interest and convenience of the owner that they should be stored to wait a future sale. Hence for the purpose of facilitating business transactions the law recognized *bills of lading, warehouse, elevator* and storage receipts as the symbols of the property represented by them, by the delivery or endorsement of which the title to the property was transferred to the holder * * * It is clear then, both from the language of the act itself and the purposes for which it was passed, that the legislature never meant to declare that a *mere receipt* issued by one engaged in the canning business for goods canned by him and which were to remain in his possession subject to the order of the purchaser, should pass title to the goods as against all other persons and should also be negotiable in the same sense as bills of exchange and promissory notes. * * * Such a construction would, in a measure, repeal the well settled law of this State which declares that no sale of personal property of which the vendor remains in possession, shall be valid except as between the parties, unless by a bill of sale or mortgage duly executed and recorded; and would destroy the safeguards, which the law has wisely thrown around sales of personal property for the protection of purchasers and creditors. * * * The receipt set forth in this indictment is not a *warehouse* or *storage* receipt."

Steaubli v. *Blaine National Bank,* 11 Wash., 426: This was suit for money alleged to have been received by defendant from the sale of certain shingles to which

plaintiff claimed title. Plaintiff's title was based on an instrument in form a warehouse receipt, which had been issued by the manager of a shingle mill. The manager signed his name as warehouseman. The shingles at the time were in process of manufacture in the mill and the "warehouse" was a place where the surplus product of the mill was stored until ready for shipment. It was held that no title to the quantity of shingles mentioned passed to the holder of the receipt, because, among other reasons, "there was no proof which could warrant us in holding that the receipt in question constituted what is known as a warehouseman's receipt."

In *Thorne* v. *First National Bank,* 37 Ohio St., 254, documents, in form warehouse receipts, issued by Thorne & Company, who were engaged in the pork packing business, and covering certain hams which remained upon their premises, were held not to be warehouse receipts but were within the statute requiring the recording of all chattel mortgages where there was no actual delivery of the property.

In *Bell & Coggeshall Company* v. *Glass Works Company,* 48 S. W., 440 (Ky. Court of Appeals), receipts issued by a corporation on its own property were held void because there was no evidence that the corporation was engaged in the warehousing business or was a warehouseman.

In *Yenni* v. *McNamee,* 48 N. Y., 614, receipts, in form warehouse receipts, covering oil remaining upon the premises of the owner, who was not a warehouseman, were held not warehouse receipts but in effect chattel mortgages and void because not recorded.

In *Adams* v. *Merchants National Bank,* 2 Fed., 174, it was held that receipts, in form warehouse receipts, issued by a partnership engaged in buying and selling of apples and in the manufacture and putting up of meats, fruits, etc., which receipts covered property in the firm's storehouse, were not valid warehouse receipts and in the hands of a pledgee were not enforceable against the firm's assignee in bankruptcy, under the statute of 1867. It was held that whatever security the alleged pledgee had was in the nature of an unrecorded chattel mortgage, void under the Indiana statutes.

It must be noted that the receipts in the foregoing cases were held void as warehouse receipts not primarily because the alleged warehouseman remained in possession of the goods but *because he was not a warehouseman in any true sense.* Had he been a warehouseman in fact the receipts would have been valid, though covering his own property in his own warehouse, and their transfer or pledge would have transferred or pledged the property.

Broadwell v. *Howard,* 77 Ill., 305.
National Bank v. *Wilder,* 34 Minn., 149.
Merchants Bank v. *Hibbard,* 48 Mich., 118.

The attitude of the courts as illustrated by the foregoing cases must have shown that as long as a merchant *himself* assumed to be the warehouseman, warehouse receipts issued by him would be ineffectual to transfer title to the property for the purpose either of a pledge or sale. The demand, therefore, referred to by counsel as a demand of modern commerce, was really a de-

mand for some improvement upon the old system which would withstand judicial scrutiny and still enable the merchant to place a secret lien upon property on his premises by means of the issuance of "warehouse" receipts. It was to satisfy *this* demand that the ingenuity of acute minds devised the scheme of interposing between the lender and the borrower a third person in the guise of a corporation, ostensibly engaged in the warehousing business.

The merchant, therefore, no longer sought to be his own warehouseman, but sought to do, through the medium of a third person or corporation, what the courts would not allow him to do for himself. In the present case we have before us an example of this new system in operation.

Although we believe the problem here presented has never been brought to this court for solution, the courts which *have* passed upon it have viewed this new development with as little favor as they did the original device.

A case in point is that of

Union Trust Company v. *Trumbull*, 137 Ill., 146.

There the principal question decided was as to the validity of certain so-called warehouse receipts issued under circumstances somewhat *similar* to those of the case at bar. Hall & Company were dealers in wool in Chicago and leased, at a nominal rental for storage purposes, certain portions of their own warehouse to the National Storage Company, a corporation organized for sub-

stantially the same purposes and of the same general character as the Security Company here. After the execution of the lease, Hall & Company placed wool in the leased portion of the premises, and the storage company thereupon issued so-called warehouse receipts to them, covering the wool so placed. These receipts were endorsed by Hall & Company and pledged by them for loans made to them by various parties. No actual control of the premises was taken by the storage company, though the premises were visited by its agents for purposes of inspection once or twice every week. The evidence was conflicting as to what signs were placed upon the premises. Subsequently, while these receipts were outstanding, Hall & Company made a voluntary assignment. Under the Illinois law, the assignee in insolvency being a mere volunteer, in no better position than the insolvent, the court held the receipt holders had equitable liens upon the property, but *held the so-called warehouse receipts void as such,* declared that there was no valid and legal pledge created by their endorsement and delivery and stated that the storage company was not under the law authorized to issue warehouse receipts.

The court further said, at page 164 (italics are the court's):

> "It is only where property is stored in a *public warehouse* that a receipt may be given which will evidence a lien upon the property."

As to the so-called leasing, the court, on page 165, had this to say (italics are ours):

> "The company never had a warehouse of its

> own, but did business by taking leases of the owners of the property of the buildings or places in which or where was stored the property for which receipts were to be issued, and then issuing to them warehouse receipts for the property. *The evidently only purpose each lease taken was to enable the company to* SAY *that the property for which the receipts was issued was in a building or place in which or where the company had possession.*"

The court further announced the rule of property in accordance with which the case was decided, by saying, at page 180:

> "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property retaining its possession can give another a lien upon it which can be enforced as against creditors and subsequent purchasers."

This was the first and only time the Supreme Court of Illinois has been called upon to determine the legal standing of "warehousing," essentially the same as that found in our own case.

The United States Circuit Court of Appeals, for the Seventh Circuit, has very recently passed upon certain phases of this warehousing system which were presented to it in the case of

In re Rodgers, 125 Fed., 169.

That was a case where Rodgers (later adjudged bankrupt), a seed merchant, leased for storage at a nominal rental, certain portions of his premises to the National Storage Company, a corporation similar to the Security Company, and entered into a warehousing agreement with it, substantially iden-

tical with the agreement in our case. Property consisting of bags of seed were placed on portions of the premises so leased, and so-called warehouse receipts were issued covering the property. These receipts were endorsed and pledged for loans by Rodgers as the receipts in our case were endorsed and pledged by Flanders.

As in our case, the warehousing company had no warehouse of its own. As in our case, the rate of compensation to be paid for "storage" was based upon the value of the property. As in our case, the storage company assumed no liability for the property. As in our case, there was no custodian or officer of the company on the premises.

The storage company placed no signs on the exterior of the premises. There was no property other than the bankrupt's received in storage. The bankrupt there, as the bankrupt here, continued to carry on business on the premises after the leasing, as he did before.

The cases differed, as each case must differ from another, in details as to the character of the enclosure and the signs, and, in fact, that Flander's company had a key to the exterior of the premises, and Rodger's company had not. These differences, it is submitted, bear only on the point whether there was a *pledge* of the property.

So far as the question whether there was a valid *warehousing* is concerned, the cases are identical.

The court denounced the entire system, declared the so-called warehousing in effect a pretense and a

sham, and held the warehouse receipts, though in the hands of the pledgees without notice, void and ineffectual for any purpose, saying, at page 178, *et seq*:

> "It is difficult for us to look upon this transaction as a warehousing of property. The storage company assumed no liability to the bankrupt, and assumed only such responsibility as the law imposes upon it with respect to those advancing money upon the faith of its warehouse warrants or receipts. The name of the company is in itself under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The bankrupt stored the property. The bankrupt paid the rental of the premises. It is true that an agent of the storage company occasionally visited the premises and inspected the property in a sort of a way, but exercised no supervision or control that would prevent the bankrupt from doing with it as his will might dictate, or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control. The written agreement indicates this. It is somewhat startling to learn that a warehouse company should store goods of this character for another upon the premises of that other, taking compensation as for storage, not related to the cost of storage, or to the expense of receiving and delivering the property, not according to the space occupied by the property, but according to the value of the property. The fact here is patent that the storage company assumed to the bankrupt no liability and that the sole purpose was to issue warehouse warrants or receipts making such inspection only as, in its judgment, would protect it from liability to third persons by reason of the issue of its warrants. To up-

hold such a scheme would permit every merchant in the state, notwithstanding the declared policy of the state to the contrary, to have possession of large stocks, thereby inducing credit, and to cover them with secret liens, thereby deceiving creditors. It would, in effect, permit such merchant to pledge his entire stock without change of possession, without record of it, and without notice to the world. Such a scheme is disapproved by the law of the State of Illinois, which in this instance we are bound to uphold, however specious may be the device or however attractive may be the form by which it is cloaked. Such a scheme within the State of Illinois is constructively fraudulent as to creditors and voidable by creditors."

A case like ours in virtually every essential detail, but where the so-called warehouseman was an individual and not a corporation, is

Tradesmen's National Bank v. *Jagode,* 186 Pa. St., 556.

This was a contest between the pledgee of certain bales of wool, and the pledgee of alleged warehouse receipts covering the same property. The facts were that the Keen-Sutterle Company deposited the wool with one Turtle, receiving his warehouse receipt, which they transferred by endorsement. Later, apparently, the company delivered the property to the defendants who made advances upon it in due course of business. This was an action in replevin by the holder of the warehouse receipts. The court thus stated the additional facts necessary to an understanding of the case and its conclusions thereon (p. 564, *et seq.*):

"In the present case one Turtle issued the re-

ceipt in question, in sufficient form as already said, purporting to be from 'Turtle's' Warehouses, 220, 222 and 224 Wood St.,' and plaintiff at the trial showed the issue of a number of similar receipts by Turtle, over a period of about two years; the negotiation of loans by several New York banks to the Keen-Sutterle Co., on these receipts; and the lease by Turtle of the premises on Wood street in his own name as a warehouse. Many exceptions are raised by appellants to the method of proof of these facts, and to their relevancy. But it is not necessary to discuss them, though some of them are clearly well founded. For present purposes it may be conceded that, standing alone, the facts so proved would make out a *prima facie* case of warehouse receipt, though the case would be weak in the respect that nearly all the evidence was of a kind that may be called corroborative, rather than positive in character.

But the above stated facts shown by plaintiff did not stand alone. On the contrary, they were accompanied by an array of others, undisputed, or so feebly contested as to be practically admitted, that deprived them of all real weight. It appeared that Turtle, during all the time he was nominally keeping the warehouse and issuing receipts for goods on storage there, was a clerk in the employ of the Keen-Sutterle Co., at a salary; that the rent of the so-called warehouse was not paid by Turtle, but by the Keene-Sutterle Co. or by F. W. Sutterle, one of the partners, and the rent due to Turtle from the sub-tenants of a part of the warehouse was not paid to him but to the Keen-Sutterle Co., or F. W. Sutterle, and the only explanation given was that there was some private arrangement, not disclosed, between Turtle and Sutterle on this subject; that no storage charges were paid by Turtle, but by the Keen-Sutterle Co., or Turtle on account of this warehouse, nor any credit given him on their books;

that no persons other than the Keen-Sutterle Co. deposited any goods in the so-called warehouse, though a few receipts were issued in the name of J. B. Moores & Company, under some arrangement with the Keen-Sutterle Co., which the learned judge declined to permit to be inquired into; and that Turtle had no sign on the warehouse to indicate his proprietorship, kept no books of the business except a book of blank receipts, had no office or even a desk in the warehouse, did not keep the key in his possession, was rarely there, and left the whole charge, including the depositing and removal of goods, to the employes of the Keen-Sutterle Co. On these facts it is perfectly clear that there was no real warehouse at all in the case and that Turtle was a mere employe or man of straw used by the Keen-Sutterle Co. to cover their own operations with their own goods.

The counsel for the appellee have argued very strenuously the proposition that if Turtle held himself out to the world as a warehouseman, and plaintiff had no knowledge to the contrary, it would be sufficient to put plaintiff under the protection of the statute. And the learned court below seems to have fallen into the same view. But this is not enough. To defeat the title of defendants as a consignee without notice, for value, and in good faith, Turtle must have been a warehouseman in fact, and plaintiff's title derived through an actual valid warehouse receipt. *It is not a question of good faith, or even of diligence, on plaintiff's part, but of the possession of a good title by means of a valid and genuine receipt.* This the plaintiff has failed to prove. The paper given to it was not such a receipt, but a fraudulent imitation, and the bank must, unfortunately for it, bear the loss. On the practically undisputed facts the verdict should have been directed for defendants."

Practically the same device was attempted, but with

no more successful results, in the case of *Moores* v. *Jagode,* 195 Pa. St., 163.

Another case in point, is

Mechanics Trust Company v. *Dandridge,* 37 S. W., 288 (Ky. Court of Appeals).

In this case the Home Construction Company turned over certain rolling stock to Dandridge, who was its secretary, to be held by him in pledge for a creditor with authority to issue a paper in the nature of a warehouse receipt. Dandridge issued a document, in form a warehouse receipt, which was endorsed by the company and pledged it to its creditor to secure a loan. The Kentucky statute provided that "all * * * persons * * * who shall receive in store or undertake to receive or take care of property shall be deemed and held to be warehousemen." The court held the document void as a warehouse receipt, and said:

> "The statute, *supra,* evidently refers to only such persons as *in fact keep a warehouse to store goods in and are engaged in that business.* It cannot be that it was the intention of the legislature to provide that any one and all persons might become legal warehousemen by simply receiving one particular piece of property in store and issuing a receipt therefor. There is no pretense that Dandridge was engaged in keeping a warehouse and storing property therein as a business. It therefore follows that the receipt was and is invalid and ineffectual, and the endorsement thereof passed no interest in the property."

The last case, together with the decisions in *Union Trust Company* v. *Trumbull, supra; Franklin National*

Bank v. *Whitehead, supra;* and *State* v. *Bryant, supra,* it is conceived sufficiently disposed of the contention that merely because the so-called storage premises were a place where property could be deposited, and by a stretch of language said to be "stored," the premises came within the statutory definition of "warehouse." A literal compliance with the definition plainly is not sufficient.

This is further illustrated by the case of *Bucher* v. *Commonwealth,* 103 Pa. St., 528, where the question was whether Bucher was a warehouseman and had issued actual warehouse receipts, the statute provided that a warehouse receipt was a receipt given for any goods, wares, grain, produce, etc., stored or deposited with any warehouseman, wharfinger or *other person.* The court said, on page 534:

> "We must have regard to whom and to what the act is intended to refer and to nothing else. It expressly indicates 'warehousemen, wharfagers and other persons,' and by 'other persons' we must, of course, understand those who are engaged in a like business or who may connect the business of warehouseman or wharfinger with some other pursuit, such as shipping, grinding or manufacturing. * * * Thus, in the application of the law and facts to the case in hand, we are brought to the question, first: What was Bucher's business? Was he a warehouseman? *Prima facie,* we would say no. A warehouseman is one who receives and *stores* goods as a business for a compensation or profit."

The principle to be deduced from the foregoing cases would seem to be; that the use of warehouse receipts as symbols of property whose transfer operates as a

transfer of the property must be limited to cases where the property is stored in a warehouse operated by a warehouseman; to extend the incidents conferred by law on warehouse receipts to documents covering property in any other situation would open a great door to fraud and nullify the rule to which the transferability of personal property by the transfer of warehouse receipt is itself an exception; therefore the courts have uniformly condemned any such attempted extension.

We have seen that in our case there was no storage in any proper acceptation of the term. The principle of the thing, therefore, and all the reasoning of the foregoing cases requires a determination that the receipts in this case were not true warehouse receipts, and that their endorsement and delivery to the Union Trust Company were ineffectual for any purpose.

The first question, therefore, should be answered in the negative.

II.

IF THE RECEIPTS WERE NOT TRUE WAREHOUSE RECEIPTS THE TRANSACTIONS DID NOT CONSTITUTE A PLEDGE OF THE LEATHER BY FLANDERS TO THE TRUST COMPANY WHICH WOULD BE VALID AGAINST ATTACHING CREDITORS.

It is argued by opposing counsel that although it should be held that the Security Company was not in fact a warehouseman and that the receipts were, therefore, not warehouse receipts, negotiable by endorsement, nevertheless, the transactions constituted a

pledge of the leather to the Trust Company, good against attaching creditors.

Let us see upon what this argument is founded.

There can of course be no valid pledge without delivery to the pledgee. As was said in *Casey* v. *Cavaroc*, 96 U. S., 467:

> "Bad faith it is true would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law adopted to prevent fraud and deception; for if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

Here it is not pretended that any leather was ever delivered *to the Trust Company* or that the company ever came into the possession of any leather.

The argument is that the endorsement and delivery *of the receipts* by Flanders to it made it the pledgee of the leather.

This, however, is merely begging the question.

The only connection the Trust Company ever had with the leather was through its possession of *receipts* endorsed by Flanders.

Unless those receipts are warehouse receipts, their endorsement and delivery could transfer no interest in the property itself. Th transfer of warehouse receipts is the transfer of the property only *because* they are warehouse receipts.

Consequently no segregation or marking of the property by the Security Company could better the title of the Trust Company. The only link connecting it in any way with the property or giving it any conceivable interest in it is broken once the receipts are held not warehouse receipts.

This, it is submitted, is stated with sufficient clearness in the decisions previously cited.

A case further illustrating the point is:

Sinsheimer v. *Whitely*, 111 Cal., 378.

In this case, certain beans were stored by one Costa in a warehouse owned by a paving company, a corporation. When the goods were taken to the warehouse they were weighed and five memoranda or "weighing tags," containing merely the name of the person in whose name they were delivered, the date, the weight, number of sacks and marks, were delivered to Costa who, later, pledged them to plaintiff as security for a debt. In a contest between the pledgee and a judgment creditor of Costa, the court held the documents not to be warehouse receipts, since they did not comply with the statute and went on to say, at page 380:

> "But it is said that the tickets were the only vouchers issued by the defendant company and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that the said company was not a warehouseman in the sense which the law attributes to that term—an inference corroborated by the fact that it makes no charge for storage. *It is only persons who pursue the calling of warehousemen—that is receive and store goods in a warehouse, as a business, for profit—that have power to issue a technical warehouse receipt, the transfer of which is a*

good delivery of the goods represented by it. (*Shepardson* v. *Cary*, 29 Wis., 42; *Bucher* v. *Commonwealth*, 103 Pa. St., 534; *Edwards on Bailments*, Sec. 332.) Since there was nothing equivalent to the delivery *of the beans in the transaction between Costa and plaintiffs*, the rights of the attaching officer are not affected by the attempted transfer."

In the foregoing case it will be remarked the property was in the possession of a third person who issued evidences of title to it. These evidences of title were delivered by the holder to his creditor *with intent to pledge* the property. Owing to a certain rule of law, these evidences of title were void as warehouse receipts. It is, therefore, held that there could be no pledge. Once determine our receipts are not warehouse receipts and this case and ours are exactly parallel.

The case supposed by counsel of both Flanders and the Trust Company selecting a special custodian and having the custodian take possession of the property for the company has no application to the present case. The Security Company was in no sense the custodian of the Trust Company. It was never selected or employed by it. It never undertook to care for anything for it. If the Security Company was the agent of anyone it was the agent of Flanders.

Consequently the analogy urged breaks down.

It is urged, however, that at least the goods were placed out of the possession and control of Flanders by placing them within the enclosure and that therefore there was a pledge of the property.

The difficulty with establishing this proposition is

that again the only way in which the Trust Company can connect itself with this leather is *through the warehouse receipts, issued to Flanders.* If the warehouse receipts are void they must, except as evidence of deposit by Flanders, be so many pieces of waste paper. Their endorsement by Flanders is as meaningless as his writing his name on a blank piece of paper. Their possession by the Union Trust Company is as ineffectual to transfer any *interest in the leather* as was the possession of the weighing tags in the Sinsheimer case.

We have then this situation: Flanders has deposited certain leather belonging to him in a certain enclosure, claimed by the Warehousing Company. He has performed certain void and meaningless acts under the impression that he was transferring title to that leather. He has not transferred title. A trustee in bankruptcy of his estate has been appointed. That trustee succeeds to Flanders' ownership of all his property. Title to the leather being still in Flanders, in spite of his attempted transfer of the leather, title to it must now be in his trustee. Is there any logical escape from this conclusion?

It is therefore respectfully insisted that a negative answer to the first question certified necessarily requires a negative answer to the second.

Hence, it is submitted that all discussion as to the character of the enclosure in which the leather was kept, the signs upon it, the keys to the doors and such other evidences of possession as may be here found are irrelevant to the question here considered.

Those matters concern only the Security Company and Flanders.

Unless the Trust Company can show some valid connection with them, it can claim no benefit from them.

However, though it is still insisted that such questions should have no bearing upon the decision in this case, let us see upon what the claim of the Security Company that it had possession and control is founded.

As a preliminary, it must be recalled that under the laws of Illinois the change of possession necessary to make good as against creditors the sale of personal property must be visible, open and notorious. (*Dooley* v. *Pease*, 180, U. S., 457.)

It is conceded by our opponents that the same rule applies to the case of a pledge.

With this in view let us see what was done to change the possession of the leather in this case and to give notice to the world that such a change had taken place.

The steps taken by the parties were briefly the following:

1. A portion of Flanders' basement was enclosed by boards fitting closely together.

2. A lease at a nominal rental of this enclosed space was executed by Flanders to the company.

3. Padlocks were attached to the doors of the enclosure and the keys to these padlocks were kept by the company. The company was also given a key to the street door of the premises.

4. Two signs, stating that the company had leased and was occupying the enclosure, were placed upon it.

5. Cards were attached to the bundles of leather in the enclosure, reciting that they were in the possession of the company.

This was all that was done by the parties to transfer possession. What was *not* done would seem to be of greater significance.

1. No signs were placed on the exterior of the premises or anywhere except upon the face of enclosure *in the basement.*

2. No custodian or representative of the company was kept on the premises.

3. The company had no office on the premises nor was there anything anywhere, except in the dimly-lighted basement, to indicate to anyone that it claimed possession of any portion of the premises.

4. The company had no key to the elevator door by which alone access was had to the basement.

5. Flanders did not cease to carry on business upon his premises exactly as he had done before.

Bearing in mind what we have seen, was the real object and purpose of the entire arrangement, can it be said that here there was even an honest *effort* to bring about a change of possession, *visible, open and notorious?*

Rather was there not a simulation of the forms and appearances without the substance of possession, as there was the simulation of the forms and appearances without the substance of warehousing.

It was said in *Second National Bank* v. *Gilbert,* 174 Ill., 485:

"The change in the character of the possession

should be indicated by such outward, open, actual and visible signs as can be seen and known *to the public,* or persons dealing with the property."

How could the public or customers of Flanders, trading with him in his store, know that in the obscurity of his basement a warehouse was in operation, through the medium of which liens could be placed upon any portion or all of his stock in trade?

Further, it must be borne in mind that Flanders was in continuous, actual possession of the premises upon which was the enclosure in question. He could exercise dominion and control over the entire store and basement.

Whether he should do so over the enclosure and the property within it, depended entirely upon his faithfulness to his engagements. The keys and enclosure, therefore, represented no actual security to the company. At any hour of the day or night Flanders might take and remove the leather from the enclosure and the company be none the wiser until its inspector came on his weekly rounds to look over the leather.

In short, if there were no enclosure, no keys and no signs, the company would have had no less control over the leather than it had with them. If Flanders fulfilled his agreements he would not touch the leather in the one case, more than he would in the other. If he were dishonorably inclined, his removal of the property would have been attended with very little more difficulty in one case than in the other. Actual dominion and control, therefore, the company did not have. Those were or might be exercised by Flanders, and Flanders only.

In brief, it is apparent that the Security Company was content to exercise no actual dominion over the property, but, on the contrary, permitted it to be left so that Flanders could do with it as he wished. The company was satisfied to rest its claim to possession on the performance of certain *symbolic* acts, sometimes recognized as a sufficient taking of possession *when no other acts could be performed.*

As in the warehousing procedure, so here, the effort is made, by the performance of certain acts, out of place and inappropriate to the situation, to claim the benefit of certain legal rules applicable only where such acts are necessary and appropriate.

For possession, it must be noted, involves the idea of actual, manual dominion and control over the property.

A change of possession equally connotes a transfer of this actual manual dominion and control by the real delivery of the property into another's custody and a parting with all control over it by the transferor. Nothing less than this fills the conception of what *actual* change of possession really is.

It is true that from the varied character of personal property, every requirement of this idea cannot always be supplied. Change of possession of a locomotive must on occasion be accomplished, but it obviously cannot be accomplished as can be change of possession of a watch.

From this has resulted the rule that *where actual manual delivery is impossible,* certain symbols of delivery will be taken as evidence of actual

delivery. But it is only where the character of the property makes actual manual delivery impossible or extremely difficult that this is so.

As is said by the Supreme Court of Massachusetts in *Harding* v. *Eldridge*, 71 N. E., 115:

> "It is uniformly held that by a contract of pledge only a special title passes to the pledgee which depends on actual possession, while the general right of property remains in the pledgor, and in order to hold and preserve his lien, there must be not only *a physical delivery, where the chattel can thus be transferred,* but continued possession also be retained."

If, therefore, actual delivery and a parting with all control is reasonably possible, that delivery and parting must be made. If they are not made, no amount of symbols and forms can make up for their absence.

The property in this case consisted of rolls or bundles of leather.

It is plain from the certificate that Flanders could remove the leather at will from the salesroom on the ground floor to the basement where it was placed in the enclosure; and, later, having sold it to a customer by sample, could remove it from the basement and ship it to the customer.

The property was therefore capable of manual delivery, easily to be handled and as easily to be shipped from Flanders' premises to an outside place for storage. What excuse can, therefore, be given for failure to make such a shipment in our case?

Obviously the Warehousing Company did not in good faith take the best possible possession of the property which the nature of the case afforded.

This being so, of what value as evidence of change of possession are the acts of *symbolic* delivery performed by the parties?

It is stated in

Sholes v. *The Asphalt Co.*, 183 Pa. St., 528,

at page 531:

> "The rule is that delivery is essential to the contract of pledge. It is true that the rule has been relaxed in cases where, because of the nature of the thing pledged, or for other reasons, the requirement of delivery would be such a hardship as to defeat the purpose of the contract; *but the policy of the law is against such relaxation,* and it has been mainly confined to cases in which the goods have remained in the possession of the pledgor as agent of the pledgee under an express agreement to that effect."

The theory upon which this warehousing system is conducted may of course be that by the leasing of a portion of the basement that portion was placed in the company's possession, and that when the leather was placed upon the portion of the floor covered by this lease, there was an actual transfer of the possession of the leather.

The execution of such a lease does *not,* however, transfer the possesion of the premises leased. This was, as we have seen, held in *Union Trust Co.* v. *Trumbull,* 137 Ill., 146 (previously cited), where, as will be remembered. the court said:

> *"The evidently only purpose each lease taken was to enable the company to* SAY *that the property for which the receipt was issued was in a building or place in which or where the company had possession."*

The effect of a lease of personal property as passing actual possession is also considered in

George v. *Pierce,* 123 Cal., 172.

In that case, plaintiff, claiming to be a pledgeholder, sued for alleged conversion of property claiming to be pledged. It was shown that George, acting in behalf of a creditor, went to a ranch and the cattle desired to be pledged were driven into a corral. As they were being driven in, the debtor, who owned the cattle, and George counted them and thereupon the debtor executed a bill of sale to George, who thereafter executed a written lease of the cattle to M., who had theretofore lived on the ranch, taking care of the cattle and milking them and dividing the proceeds of the milk with the owner. M. continued to do this after the lease to him. The court, in holding the attempted pledge void as against attaching creditors, said at page 175:

> "The transaction pertaining to this transfer was enveloped in writings, which was well enough for the purpose of evidencing the rights of the respective parties to it; but the statute which deals with a change of possession sufficient to defeat creditors does not contemplate writings, but acts. No writings pertaining to a transfer of personal property, regardless of their number or character, can create an actual and continued change of possession as to creditors of the pledgor. Acts only can do it. A visible, actual, continued change of possession must be had, and the law will be satisfied with nothing else. Writings can never accomplish these results. In the investigation of the question now before us the bill of sale from De Long to George goes for naught. The lease from De Long to Matoni of the land upon which these cows had previously pastured, and upon

> which they were subsequently to pasture, is an unimportant circumstance. The lease of the cattle by George to Matoni at a rental of thirty dollars per month in no way tends to prove either an actual or a continued change of possession to George."

It cannot, therefore, be contended that the mere placing of property upon a certain portion of the floor leased to the Warehousing Company was an actual manual transfer of property to that company.

If, however, by any course of reasoning it is urged that actual delivery was unnecessary, and symbolic delivery was sufficient, which seems in effect to be the argument made by the appellants, we come to consider the sufficiency of these symbols under the circumstances. The first is the fact that the warehousing company had a key to the street door of Flanders' premises and had the only keys to the doors of the enclosure.

The delivery of a key cannot of itself, however, be conclusive evidence of a transfer of possession.

This is made plain by the case of

Watson v. *Dealy*, 59 N. Y. Supp., 623,

where a landlady gave a mortgage on the furniture in the house to a boarder. The boarder thereupon announced that he was in possession and that the landlady might live there, and took the keys; but the landlady continued to conduct the house and use the furniture. Held, there was no sufficient transfer of possession.

In *Harrington* v. *Blanchard*, 70 N. H., 597, where a merchant in good faith sold his stock in trade to

the defendant, and the store was closed long enough to take an inventory and the key delivered to the defendant, the vendor was then employed to sell the stock upon commission for the defendant. The same signs remained upon the store, although notice of the sale was published in a newspaper. It was held, however, that as against attaching creditors the acts performed did not constitute a sufficient change of possession.

At this point it is well to recall that the only access to the basement was by means of the freight elevator. Flanders had a key to the sliding elevator door. The warehousing company had not. At any time, therefore, Flanders, by locking the elevator door prevented the company, in spite of its keys, from having access to its storage premises. The keys, therefore, as real aids to taking actual possession were valueless.

It is, however, argued that the alleged possession of the Security Company is aided by their placing signs upon the face of the enclosure.

But surely claiming the existence of a fact by means of a printed sign does not cause that fact to exist. If the Warehousing Company was not actually in the possession of the property in question, no amount of printed paper, attached however conspicuously to the property, could place it in possession.

This is well illustrated by the case of *Story* v. *Cordell,* 13 Mont., 204.

This was replevin for certain barrels of whiskey. Plaintiffs who were creditors of Cordell went to him for payment of their account. Cordell gave them a

bill of sale to the whiskey in question with an agreement that if the debt were paid within a certain time the sale should be cancelled. The whiskey was in the back room of a store in Cordell's warehouse. On execution of the bill of sale the agent of the plaintiffs *marked the barrels with the name of the plaintiffs and also cut a cross upon the barrels.* He also took the whiskey from where it was stored in the back room and placed it in the center of the room. Cordell remained in possession of the building, the front room of which was used as a salesroom and the back room as a warehouse. In a contest between plaintiff's and Cordell's assignee in insolvency, it was held under a statute which made bills of sale and chattel mortgages void unless the possession be delivered to the mortgagee that there was no sufficient transfer of possession and the mortgage was void.

Another case illustrating the inefficacy of signs to constitute a sufficient change of possession to constitute a valid pledge, is *Thorne* v. *First National Bank,* 37 Ohio St., 254 (previously cited). In that case a partnership was engaged in the business of slaughtering hogs and packing pork. Thorne lent them some $13,000, and the firm attempted to give him a lien upon certain hams in their place of business. They executed to him two so-called warehouse receipts, the first of which recited that they had received on storage six thousand hams which were held subject to Thorne's order and were to be delivered to him on presentation of the warehouse receipt. The second recited the receipt from Thorne of five thousand dollars as an advance on fifty

thousand pounds of ham then in the pork house of the firm. A member of the debtor firm went to the pork house with Thorne and pointed out the hams, which were mostly in hogheads, stating that he made a delivery of the hams, and that he would mark them for Thorne. Thorne acquiesced in this, *and the hogsheads were all marked in chalk plainly with Thorne's name.* All the hams embraced or mentioned in the warehouse receipts were separate and apart from all other hams and meats in the house.

In a contest between Thorne and a subsequent purchaser of these hams, the court held that as against the purchaser Thorne did not receive the hams in pledge, because in order to constitute that pledge it was necessary that he should receive and retain possession of the property. Nor were the instruments valid warehouse receipts. The court said, at page 260:

> "Here was an attempt to create by the instrument in question a lien on the hams to secure the debt of Elias Thorne. There was no change of possession, much less a continual change of possession. There was no execution of a chattel mortgage on the property—much less a filing of such mortgage with the township clerk. The attempt was, therefore, within the inhibitions and in conflict with the policy of the above section [referring to chattel mortgage act substantially similar to the Illinois act], and the lien so attempted to be secured was as to the bank and creditor of the firm simply a nullity."

So, also, in *Button* v. *Rathbone,* 126 N. Y., 187, it was held that the holder of an unrecorded chattel mortgage did not, by setting the property apart from the rest in the store of the mortgagor and marking the

articles with his name by the use of tags, secure such immediate delivery and such an actual and continued change of possession of the property as would obviate the necessity of filing the mortgage for record.

Where, therefore, the property is capable af actual delivery, neither the leasing nor the delivery of the keys, nor the segregation of the property, nor the marking of the articles by signs, necessarily constitutes *of itself* a valid transfer of possession.

Is there any reason why these circumstances in combination should produce any such result? If any one of them may be a mere empty form, and that each of them may be, has been, we have seen, judicially decided, why should the concurrence of all these circumstances in any one case compel the conclusion that there has been an actual change in the possession of the property.

That they were no more than forms in our case is apparent when one considers the situation of the premises and the control over the property which the entire arrangement, though carefully carried out, left as we have seen, in Flanders.

A further fact which we desire to impress upon the court's attention in considering this phase of the case, is this:

The course of business pursued by the parties permitted the continual substitution of different receipts as security for a continuing debt. It the receipts were valid warehouse receipts this would probably be legitimate enough. There should be no rule of law preventing a debtor who has pledged valid warehouse

receipts as collateral for his debt to substitute new receipts for other property as collateral and withdraw the ones he had previously pledged. Where, however, tangible property is deposited by way of pledge, and the arrangement permits the debtor continually to substitute other property, selling the property, previously pledged, in the course of such business, it would seem to invalidate the pledge.

The certificate shows that Flanders never deposited all the leather of any particular kind in the enclosure. He always retained at least a sample, and sold the goods in the enclosure by means of this sample.

Eliminating the receipts from our consideration, it will be seen that this procedure enabled Flanders to deal with the leather in the enclosure exactly as he could deal with leather outside of it, and there was nothing to prevent his selling leather in the enclosure and substituting new receipts, for other leather, as collateral for his loan, deposited in place of the old receipts originally placed as collateral.

Circumstances such as these were considered enough to defeat what otherwise might have been held to be a valid pledge in

Caperton v. *McCormick,* 22 Southern Reporter, 60 s. c., 74 Miss., 857.

which was a case where the American Cooperage Co. being indebted to McCormick in the sum of $10,000 agreed to pledge to him sertain cooperage material upon its grounds as security for this debt. A lease of a part of the land of the company was thereupon made

to McCormick and it was agreed that some $12,000 worth of material should be placed thereon with some distinctive mark upon it and left in possession of one Hayne as the agent of McCormick. It was agreed either at the time of the placing of the material on the premises or by separate agreements made later in each instance that as often as any of the property should be used or removed from its then location, said Hayne should see that an amount of property of equal value should be substituted for the property so taken, and that the substituted property should be placed in the same location and be marked by Hayne with the same mark as the other property, at once. The agreements of the parties appear to have been carried out in good faith. The cooperage company later went into the hands of a receiver, and McCormick filed an original supplemental bill for the return of the property claimed to have been pledged. The court, in holding the pledge invalid, said:

> "We find ourselves, after repeated examinations of the record and of the many authorities cited, unable to concur with the learned chancellor. The possession was too equivocal, looking to the constant substitutions and the whole evidence touching the character of the possession. Jones, Pledges, Sec. 40, *et seq.; Nisbet* v. *Trust Co.*, 12 Fed., 686; *Trust Company* v. *Trumbull*, 137 Ill., 146; *Casey* v. *Cavaroc*, 96 U. S., 467. In this last case, as here, all the money arising from the sale of the originally deposited securities went to the bank and not to the pledgee. It may be conceded that Mr. McCormick acted in perfect good faith. But the presence of good faith cannot supply the lack of the character of possession essential to the existence of a pledge. * * *

In *Sumner* v. *Hamlet,* 12 Pick., 76, the strongest case learned counsel for the appellees has cited, it seems there was a new and independent arrangement and contract, both as to the debt and the pledge, made in October, 1829, and the forty-five pieces of flannel selected under the new contract were never substituted. * * *

Of course, delivery may be according to the nature of the thing delivered, as of the contents of a warehouse by delivery of the key, or of a warehouse receipt, or as by delivery of a bill of lading, or as by binding out logs in a boom, etc. We are not speaking specially here of the mere delivery of the material, but on the whole evidence it seems to us clear that the claim of Mr. McCormick cannot, under the inexorable rule of law as to the character of possession, be upheld."

We come now to consider the authorities cited by opposing counsel in support of their contentions in this case. These authorities are, with very few exceptions, concerned not with the question whether there is a valid warehousing, but whether the steps taken were sufficient to constitute a valid change of possession. In fact, in very few of them does the question of warehousing enter at all.

Those bearing upon the validity of a pledge or sale may be divided naturally into two classes and the fact that they can be so divided shows that they are inapplicable to the principles here discussed.

The first class consists of cases where the sole question considered was whether the transaction in question was a valid sale or pledge *as between the parties themselves.* In this class are

Hatch v. *The Oil Company,* 100 U. S., 124.

First National Bank v. *Penn. Trust Co.*, 124 Fed., 968.
Allen v. *Hollander*, 128 Fed., 159.

The other class of cases are cases where, *owing to the character of the property*, actual physical delivery was impossible, but the parties took all the steps possible, under the circumstances, to effect delivery. These cases are

First National Bank v. *Penn. Trust Co.*, 124 Fed., 968.
Bank of Rome v. *Haselton*, 83 Tenn., 216.
Kentucky Furnace Company v. *City Bank*, 25 Ky. Law Rep., 28.
Fidelity Company v. *Roanoke Iron Company*, 81 Fed., 439.
American Warrant Company v. *German*, 126 Ala., 194.
Dunn v. *Train*, 125 Federal, 221.
Proctor v. *Shotwell*, 79 S. W. Rep., 728.

In the case of *Hatch* v. *The Oil Company, supra*, an examination of the opinion will show that the sole question considered was whether there was a sufficient delivery to constitute a sale *as between the vendor and vendee*. It seems to have been assumed that in the absence of actual fraud, this would be sufficient as against attaching creditors. The court, having decided that there was sufficient delivery *as between the vendor and vendee*, decided, as a matter of course, that, there being no fraud, this delivery was sufficient as against attaching creditors. This decision was expressly in conformity with the Michigan law. Under

the laws of Illinois, of course, it would by no means follow that delivery sufficient to pass title as between vendor and vendee would be sufficient to protect the property from seizure by the vendor's creditors, and this distinction is expressly conceded by opposing counsel, upon page 15 of their brief. In addition to this, however, it must be noted that the acts performed in the Hatch case in removing the staves from the land adjoining the vendee's mill to land actually leased by the company and the actual control by the pledgee, obviously amounted to a sufficient taking of possession, for the simple reason, if for no other, that they were plainly *the only acts which could be performed in order to change possession.*

The *Allen* case and the *First National Bank* case are decided upon the express ground that the trustee in bankruptcy stands in the exact position of the bankrupt himself. These two decisions, therefore, cannot be relevant to an inquiry whether there was any pledge in this case which would be good as against attaching creditors. Moreover, in the *First National Bank* case, the property, consisting of steel billets, was of a cumbrous nature, and hence there was a situation where the law would permit the symbolic taking of possession by the placing of signs upon the property, actual physical delivery being out of the question. The court expressly remarked that the steel billets, "by reason of their weight and bulk were permitted to remain upon the premises of the vendor."

In *American Warrant Company* v. *German,* 126 Ala., 194, the plain grounds for distinction are found on the fact that the ground leased to the pledgee was located

apart from the iron yards of the company; that the property was actually accepted by the pledgee, who apparently remained in charge of it, the iron being removed during his temporary absence; and the obvious and striking difference that the property in that case was of an exceptionally cumbrous and unwieldy nature, the iron, as appears from the report, being piled in 100 ton lots. The decision was expressly placed upon the ground that, *considering the character of the property,* the delivery was sufficient.

In *Dunn* v. *Train*, 125 Fed., 221, the property consisted of three hundred and fifty thousand pounds of paper and was actually and in fact delivered to the agent of the pledgee, which agent or his successors remained in actual charge of the property, which was set apart and kept distinct from all the other property of the pledgor. As was said on page 225:

> "It is distinctly found that the delivery or deposit was actually made to the pledgee and that dominion over the property was exercised by the pledgee through its agent down through to Gedney, when, in December,—as distinctly found by the learned judge below—the paper, which had been already delivered and deposited in the basement and shipping room of the mill, was transferred to the new store house and remained under the care of Gedney, who had been appointed the agent of Train, Smith and Company, where it remained apart from all other paper replevied."

It may be admitted that this is an extreme case, but it may be easily distinguished from the case at bar on the ground of the particularly cumbrous character of the property and that actual possession was taken of it by an agent, who continued in charge.

In *Bank of Rome* v. *Haselton,* 83 Tenn., 216, the property, consisting of heavy material, such as pig iron, etc., was stored outside and inside of a warehouse leased to one Low. The lease of this warehouse, near the pledgor's premises, was made it appears, because of the heavy and unwieldy character of the property. Low always remained, either through himself or an agent, *in actual possession and charge of the warehouse* in which the property was stored.

The distinction between this and our case, where there was no representative of the warehousing company ever permanently upon the premises and where the property was of such nature as to be easily removably is, we think, too plain further to be enlarged upon. Low, moreover, who issued the warehouse receipts in question, was, as remarked by the court, *a regular warehouseman, having a warehouse of his own in the city,* and leased this warehouse building from the iron company, becoming the sole and exclusive occupant of it.

In *Kentucky Furnace Company* v. *City Bank,* 25 Ky. Law Rep., 28, the Kentucky Furnace Company leased a piece of its land to one Holt and then placed its pig iron upon the land so leased. Holt thereupon issued warehouse receipts covering this pig iron and the receipts were pledged to the appellee for money loaned. So far as can be ascertained from the report, Holt remained in actual control of the land and of the pig iron. Moreover, he took charge of it for and on behalf of the pledgee of the receipts. The distinction between that case and ours, as found in the remark of the court that

"the property was cumbrous and in regard to

heavy property like this the rule as to things easily carried off or concealed does not apply."

In *Proctor* v. *Shotwell*, 79 S. W., 728, the warehouse in which the property was stored was a separate building, several blocks away from the premises of the pledgor. The warehousing company's sign was *upon the exterior of the building* and signs were upon the bins within. The warehousing company was, as appears from the opinion, notified of the transfer of the receipts. The court sustained the pledge, simply on the ground that this was a plain case of bailment with notice to the bailee.

Millhiser Mfg. Co. v. *Milling Company*, 101 Va., 579, is certainly not in point, for the reason that the milling company was authorized by its charter to conduct a warehouse and was in fact *actually engaged in the warehousing business, having a warehouse of its own.* It was not, however, a *licensed* warehouse and the sole question was whether an *unlicensed* warehouseman could issue valid warehouse receipts. The court merely held that the warehouse was a good *common law* warehouse and that the receipts were therefore valid warehouse receipts. The decision of this question cannot bear on the present case, where there was no actual warehousing in fact.

There remains to consider the case of *Sumner* v. *Hamlet*, 12 Pickering, 76. This, it must be admitted, is an extreme case. One obvious ground for distinction, however, is that an agent of the pledge was placed in custody of the goods in question and remained upon the premises and was therefore continuously in complete control of the property pledged.

It may be doubted, indeed, whether a similar decision would have been rendered by an Illinois court.

Martin v. *Sexton*, 72 Ill. App., 395.

And it may further be doubted whether a like decision would be rendered on similar facts by the Supreme Court of Massachusetts to-day.

Moores v. *Redding*, 167 Mass., 322.

Drury v. *Moores*, 50 N. E., 618.

However, the distinction here made between this case and the case at bar is, it is submitted, a valid one, and the decision consequently is not an authority against us.

None of the foregoing cases, therefore, establish the proposition that the acts performed under the circumstances of our case were a sufficiently open, notorious and visible transfer of possession to render the supposed pledge good as against attaching creditors. On the contrary, from an analysis of these cases, it is only too apparent that the Security Company has, in the course of its business, relied for its possession solely upon the performance of certain *symbolic* acts which, while sufficient to transfer possession under the exceptional circumstances of some of the cases reviewed, must be ineffectual to work a change of possession in any ordinary case, like the case at bar.

The second question certified should, therefore, it is respectfully urged, be answered in the negative.

III.

THE TRUST COMPANY HAD NO EQUITABLE LIEN UPON THE LEATHER ENFORCEABLE AGAINST A TRUSTEE IN BANKRUPTCY.

The argument that the Trust Company had an equitable lien enforceable against a trustee in bankruptcy assumes of course that it had no *legal* lien. This branch of appellants' argument is based on the hypothesis that the receipts were not warehouse receipts, and that there was not sufficient transfer of possession to create a valid pledge.

At the outset therefore we find that the bankrupt has by the endorsement of certain documents, attempted to transfer the title to certain property as security for a loan without transferring actual or constructive possession.

He did attempt to transfer *possession* by the *delivery* of the receipts and if they had been valid warehouse receipts he would have succeeded.

By hypothesis he has failed and the Trust Company's only claim must rest on the transfer of *title* attempted by the bankrupt when he *endorsed* the receipts.

Its claim, in other words, is that of a mortgagee,

Bell Co. v. *Glass Works Co.*, 48 S. W., 440

Thorne v. *First National Bank*, 37 Ohio St., 254.

Yenni v. *McNamee*, 48 N. Y., 614.

Adams v. *Merchants National Bank*, 2 Fed., 174.

For when bills of lading or warehouse receipts are endorsed and delivered as collateral security, the *title* as well as the constructive possession passes to the pledgee.

Chicago Dry Dock Co. v. *Foster*, 48 Ill., 507.

This is pointed out in the case of *Casey* v. *Cavaroc*, 96 U. S., 467, where the court said:

> "The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge and if possession be once given up the pledge as such is extinguished. The possession need not be actual, it may be constructive. * * * In some cases such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. *In such a case there is a union of two distinct forms of security—that of mortgage and that of pledge; mortgage by virtue of the title and pledge by virtue of the possession.*"

The Chattel Mortgage Act of Illinois (Hurd's Ill. Rev. Stat., Cap. 95, § 1, p. 1270), provides:

> "That no mortgage trust deed, *or other conveyance of personal property having the effect* of a mortgage *or lien* upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall

for the purposes of this act be deemed a chattel mortgage."

Of course there is no contention that the receipts in this case were acknowledged and recorded as above provided.

The Bankruptcy Act provides (Sec. 67 (a)), that

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate."

Clause (d) of this section upon which appellants rely provides only that "liens * * * accepted in good faith * * * *which have been recorded according to law if record thereof was necessary* shall not be affected."

At the outset therefore, once conceding that the receipts here are not warehouse receipts and that there was no pledge, we find that whatever lien the Trust Company may have is by express enactment made ineffectual against a trustee in bankruptcy.

This is in no respect contrary to the case of *Union Trust Co.* v. *Trumbull, supra.* In that case the holders were held to have an equitable lien enforceable against the assignee in insolvency because under the laws of Illinois as that case held such an assignee takes the rights and only the rights of the insolvent. (See, also, *Hooven* v. *Burdette,* 153 Ill., 672.)

Neither is it any answer to say that such a lien as was here attempted could not be made valid by recording the instrument. It has been held that recording a contract of conditional sale, void against creditors, will not make it valid (*Gilbert* v. *Nat. Cash Regis-*

ter Co., 174 Ill., 288), but that is not our case. Such a contract is void under the general policy of the Illinois law. But it is not by its terms within the chattel mortgage act because instead of there being a *transfer of the title* as security from debtor to creditor *without transfer of possession* as in our case and as provided against by the statute, there is *a transfer of possession* from seller to buyer with an attempted *reservation of title* in the seller.

Holding the receipts in this case in legal contemplation, chattel mortgages would, of course, have no effect upon *real* warehouse receipts. They are not within the statute because when they are delivered the property itself is in contemplation of law delivered.

Neither can it be rightly contended that the hypothesis that the receipts are not warehouse receipts destroys the argument because if they were not actual warehouse receipts the legal title could not be transferred by indorsement, and hence there could be no mortgage.

There is at least an *attempted* transfer of the legal title by way of mortgage. If the attempt did not succeed surely a chattel mortgage void not only because unrecorded but for other reasons, cannot have standing higher than a chattel mortgage void only because unrecorded.

It is earnestly insisted therefore, that the argument of our opponents based upon other sections of the Bankruptcy Act, has no bearing upon this case.

At this point it should be noted that the case of *Hauselt* v. *Harrison*, 105 U. S., 401, cited by appellants in their argument for an equitable lien, de-

cided only that an agreement in the nature of a chattel mortgage, though unrecorded, was enforceable against an assignee in bankruptcy under the act of 1867, who stood in the shoes of the bankrupt. The decision has no application, therefore, to the present case.

In *Walker* v. *Brown,* 165 U. S., 654, also cited by appellants, the question of an equitable lien arose between one of the original parties to the agreement and the administratrix of the other. The case, therefore, cannot apply to ours.

In *Matthews* v. *Hardt,* 79 App. Div. (N. Y.), 570, however, the question arose between an equitable lien holder and a trustee in bankruptcy. In that case the debtor agreed with the creditor more than four months prior to the bankruptcy of the debtor that for advances made, the creditor should have a lien upon the debtor's property. There was no change of possession at the time of the agreement. Afterwards, but within four months of the debtor's bankruptcy, the creditor took possesion of the property covered by the agreement. It was held that such taking possession worked a preference and that the trustee was entitled to the property as against the lien holder. It will be noted that this decision necessarily involved the determination that the equitable lien created by the agreement was void *as against a trustee in bankruptcy.*

There remains to consider the argument that the Trust Company held an equitable lien of some undefined character enforceable against the trustee in bank-

ruptcy under Section 67 (d) of the bankruptcy act which is above quoted.

With all deference to opposing counsel, it is submitted that portions of the act other than those quoted by them have, in spite of their conclusion to the contrary, a bearing upon the question before us.

Clause (d) follows immediately after clause (c) of section 67, which provides that:

> "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession which was given against a person within four months before filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt. If (1) it appears that said lien was obtained and procured while the defendant was insolvent, and that its existence and enforcement will work a preference or (2) the party or parties to be benefitted thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) if such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved but the trustee of the estate of such person for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not the bankruptcy proceedings intervened."

Immediately following is clause (d) which provides for the protection of liens given or accepted in good faith for present consideration, and properly recorded if record thereof was necessary.

A consideration of these two clauses taken in connection with the other provisions of the act must, we think, make it plain that clause (d), though in form distinct, is in fact a modification of clause (c) and is not meant to afford protection to the holders of any liens other than the holders in good faith of the liens *specified in the preceding clause.*

An assignee for value without notice of a judgment by confession, against an insolvent obtained within four months of his bankruptcy, would be an example of the class of lien holder protected by this clause.

An analogy to the construction here contended for is found in clause (f) of section 67 which provides that all levies, judgments, attachments or other liens obtained through legal proceedings against an insolvent within four months of his bankruptcy, shall be null and void in case he is adjudged bankrupt; unless the court shall on due notice, order that the right under such levy, judgment, attachment or other lien, shall be preserved for the benefit of the estate and thereupon the same may pass and shall be preserved by the trustee for the benefit of the estate * * * "*provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a bona fide purchaser who shall have acquired the same without notice or reasonable cause for inquiry.*" Clause (c) and clause (f) covering as they do much the same subject-matter and being in some respects in conflict, have been interpreted by many of the bankruptcy courts, and it has been held that where there is any conflict, clause (f) governs. This point is not of importance here

except as showing that the rights of a *bona fide* holder of the liens declared void under clause (c) are protected by the clause immediately following, (d), while in clause (f) the rights of a *bona fide* holder are protected by a proviso attached to the clause itself. There being such a great similarity between clause (f) and clause (c), this seems to us an added reason for holding that clause (d) should have no greater effect than that of a modification of clause (c).

Moreover, the argument that the rights of the trustee are in a case like ours merely the rights of the bankrupt must involve this absurdity; by express provisions of the act the trustee may be subrogated to the rights of a levying creditor if the levy is made within four months of the bankruptcy. It is argued, however, that in the absence of such a levy the trustee takes no greater title than the bankrupt himself.

If this is so, a simple and logical means of evading the results of such a ruling is for creditors contemplating the filing of an involuntary petition in bankruptcy, to arrange for the issuing of an attachment on behalf of another creditor before the filing and for a seizure by the sheriff of all property of the debtor against which there are liens void against attaching creditors.

Upon the filing of the petition in bankruptcy and the appointing of a trustee, the court may thereupon order that the trustee shall be subrogated to the rights of this attaching creditor, and this being in strict conformity with the express provision of the bankrupt act, the trustee will thereupon take the property free of all liens void against attaching creditors. The absurdity

of the conclusion, that the trustee could exercise the full powers conferred by the bankrupt act only by the intervention of a constable or sheriff, is, we think, sufficiently apparent.

Yet, this must be the logical result of the interpretation urged by opposing counsel.

This brings us to the argument of appellants based upon section 70 of the bankruptcy act. That section provides that the trustee shall be vested by operation of law with *the title of the bankrupt* to property transferred by him in fraud of his creditors and to property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. If the reasoning of appellants is correct, this section should terminate with the phrase "title of the bankrupt," for, as interpreted by them, the subsequent clauses would be entirely meaningless.

To make so much of this section meaningless merely because the expression "title of the bankrupt" is used, seems a very forced and very unnecessary construction. In all cases of judicial seizure of a debtor's property, it is "the title of the debtor" that is attached. Under no other theory could the levy upon property for example covered by a contract of conditional sale be justified. In such case, *as between the parties,* the seller has the *title* and the buyer merely the possession.

The property may be attached for a debt of the buyer, not on the theory that the seller's property may be taken from him as a penalty for entering into

such a contract, but because in contemplation of law where creditors are concerned, title to the property is in the buyer. The title of the bankrupt therefore may mean two very different things. It may mean his title as between him and the holder of a lien void against creditors, or it may mean his title when the rights of a levying creditor are taken into consideration. It is therefore perfectly correct to refer to the interest in property which an attaching creditor might seize as the "title of the bankrupt."

We are fortified in our conclusions upon this branch of the case by the opinion of the Circuit Court of Appeals for the Fourth Circuit in

Chesapeake Shoe Company v. *Seldner*, 122 Fed., 593, where the court says, at p. 598:

> "If the 'title of the bankrupt' in section 70a means title as between him and a consignor or vendor, this section of the act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous. The registry statutes of the states do not invalidate the title of the vendor by such a contract as between him and his vendee, but only as between the vendor and the creditors of the vendee. Quite aside from the violence done to the plain meaning of the words, 'title of the bankrupt * * * to property * * * which might have been levied upon and sold under judicial process against him,' clause 4 of section 70a would seem to make an end of the contention here set up. The trustee takes 'title of the bankrupt * * * to * * * property transferred by him in fraud of his creditors.' If the words, 'title of the bankrupt,' do

not mean title as between him and his creditors, the language above quoted is meaningless. As between the bankrupt and his fraudulent grantee, the bankrupt has no title (*Spencer* v. *Duplan Co.* (C. C.), 112 Fed., 638), and to give any effect, or even meaning, to clause 4, we must construe the words, 'title of the bankrupt' as meaning title as between the bankrupt and his creditors.' "

The precise question now before us was decided as here contended for, in

In re Rodgers, supra.

Other cases in point are

In re Pekin Plow Co., 112 Fed., 308.
In re Thorp, 130 Fed., 371.
Tatman v. *Humphrey*, 184 Mass., 361.
In re Carpenter, 125 Fed., 831.
In re Butterwick, 131 Fed., 371.
In re Garcewich, 115 Fed., 87.

We come now to the question of estoppel urged by the appellants. At the outset, it may be remarked that there is no averment in the certificate that the Union Trust Company took these receipts in ignorance of the character of the alleged warehousing. The only finding is that it took them in the regular course of its business. This, we take it, is no more than that the bank took them as collateral for loans actually made. There is no evidence that it is the regular course of the banking business to take securities without investigation as to their character and unless the Trust Company can show that the receipts were taken in justifiable ignorance of their true character

and in reliance on the representations contained therein, we are unable to perceive any ground for estoppel against anyone.

If it took them in such ignorance and upon such reliance, undoubtedly the Security Company would be estopped from denying the truths of the statements contained in the receipts. We cannot perceive, however, that Flanders made any warranty of the truthfulness of these statements by endorsing the receipts and delivering them to the Trust Company. Neither can the Trust Company claim the rights of a *bona fide* holder of commercial paper which after all is what this argument on its part comes to. In Illinois the holder of a valid warehouse receipt, is not in the position of a *bona fide* holder of commercial paper.

Canadian Bank of Commerce v. *McCrea*, 106 Ill., 281.

It is further submitted that the argument of estoppel proves entirely too much. If it is valid there would be no need of the elaborate system of enclosure, signs, locks and keys so largely relied upon by the appellants in this case. Any person or corporation could issue warehouse receipts covering a merchant's entire stock of goods without the slightest pretense of actual warehousing or of a change in possession. It cannot be possible that in such case if a bankrupt succeeded in pledging the false warehouse receipts, so issued that the pledgee who had made no attempt to investigate the real character of the alleged warehousing would be entitled, in the event of the bank-

ruptcy of the pledgor, to seize his entire stock of trade to the exclusion of other creditors.

Yet this must be the effect of appellants' argument if pushed to its logical conclusion.

It is, therefore, respectfully urged that all the questions certified should be answered in the negative.

Respectfully submitted.

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